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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1290

CHARLES A. A'HEARN,

Petitioner,

—v.—

COMMITTEE ON UNLAWFUL PRACTICE OF THE LAW OF THE NEW YORK COUNTY LAWYERS ASSOCIATION,

Respondent.

BRIEF OF NEW YORK COUNTY LAWYERS' ASSOCIATION, RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

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BRIEF OF NEW YORK COUNTY LAWYERS' ASSOCIATION, RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

This brief is submitted on behalf of the New York County Lawyers' Association, the respondent above named.

Statement of Questions Presented

1. Does § 90, subdivision 2 of the Judiciary Law of the State of New York confer jurisdiction over non-lawyers practicing, or assuming to practice law upon the Appellate Divisions of the Supreme Court of the State of New York?

2. Do the Appellate Divisions of the Supreme Court have the right to order, conduct or sanction an investigation of non-lawyers practicing or assuming to practice law under the authority conferred by § 90, subdivision 2 of the Judiciary Law?

3. Can the Appellate Divisions of the Supreme Court issue subpoenas to compel the attendance of witnesses and

the production of records and documents in aid of an investigation concerning non-lawyers who practice or assume to practice law?

4. Can the Appellate Divisions of the Supreme Court order, conduct or sanction an investigation of non-lawyers practicing or assuming to practice law through the agency of a bar association incorporated under the laws of the State of New York, acting by a duly constituted committee of such bar association?

5. Does Rule XII-A require respondent to establish probable cause by a factual statement under oath as a prerequisite to the issuance of a subpoena?

6. Does the issuance of this subpoena under Rule XII-A deprive appellant of life, liberty or property without due process of law?

7. Does the subpoena as issued constitute an unreasonable search and seizure?

8. Does the subpoena as issued constitute any other violation of the Fourth, Fifth, Sixth or Fourteenth Amendments to the United States Constitution?

The courts below answered questions 1, 2, 3 and 4 in the affirmative and 5, 6, 7 and eight in the negative.

Statement of the Case and Argument

Petitioner has been engaged in the business of pension and profit-sharing planning for some 25 years and maintains offices at 230 Park Avenue, New York, N. Y. (A 9).*

* References are to pages in appellant's appendix unless otherwise noted.

He is not a member of the bar of New York or any other state (A 9).

On November 21, 1966 respondent's Committee on Unlawful Practice of the Law (hereinafter referred to as "the Committee") advised petitioner, by letter, that it had learned that he was "offering [his] services to the public in the designing and drafting of pension, profit-sharing, and employee benefit programs." (A 23), and that a subcommittee had been appointed to investigate the matter, confer with petitioner and report to the Committee thereon (A 23). Petitioner was advised that he had the right to be represented by counsel at all stages of the proceeding (A 24).

On December 21, 1966 in response to petitioner's request for additional information (A 25) the Committee stated that the business engaged in by petitioner, by definition, entailed the performance of legal services (A 27) and that its investigation was designed to elicit the actual and pertinent facts relating to the services performed by petitioner and, for this purpose sought his voluntary cooperation (A 27-28).

On December 27, 1966, petitioner stated that he would not voluntarily cooperate with the committee (A 29).

Thereafter, and in June 1967, the chairman of the Committee applied to the Clerk of the court, pursuant to Rule XII-A of Part 4 of the Rules of the Appellate Division, First Department, for the issuance of a subpoena addressed to petitioner (A 30-31).

The subpoena duces tecum which accompanied the application was duly issued by the Clerk in the name of the

Presiding Justice on September 21, 1967 (A 13-14) and thereafter it was served upon petitioner (A 9).*

Petitioner then moved to quash said subpoena and said motion was denied by an order of Special Term, Part I of the Supreme Court entered January 8, 1968.

Petitioner appealed the order of Special Term to the Appellate Division, First Department and the appeal was transferred by said court to the Appellate Division, Third Department, pursuant to § 5711 CPLR.

The Appellate Division, Third Department affirmed the order of Special Term on May 10, 1968, one Justice dissenting.

Petitioner appealed to the Court of Appeals which affirmed unanimously (6-0) (23 N.Y. 2d 916).

Applicable Statutes and Rules

Section 90, Subdivision 2, Judiciary Law (App. C, p. 58):

> "2. The supreme court shall have power and control over attorneys and counsellors-at-law and *all persons practicing or assuming to practice law . . .*" (Emphasis added)

Section 476-a. Judiciary Law:

> "476-a. ACTION FOR UNLAWFUL PRACTICE OF THE LAW
>
> 1. The attorney-general may maintain an action upon his own information or upon the complaint of

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* Petitioner's statement of the period of time covered by the subpoena is erroneous. The original subpoena (A 13, 21) was limited to the period January 1, 1966 to May 31, 1967. There was no modification.

a private person or of a bar association organized and existing under the laws of this state against any person, partnership, corporation, or association, and any employee, agent, director, or officer thereof who commits any act or engages in any conduct prohibited by law as constituting the unlawful practice of the law. . . ."

Section 476-b. Judiciary Law:

"476-b. INJUNCTION TO RESTRAIN DEFENDANT FROM UNLAWFUL PRACTICE OF THE LAW

In an action brought as prescribed in section four hundred seventy-six-a, the final judgment in favor of the plaintiff shall perpetually restrain the defendant from the commission or continuance of the act complained of . . ."

Section 750-B, Judiciary Law:

"B. In addition to the power to punish for a criminal contempt as set forth in subdivision A, the supreme court has power under this section to punish for a criminal contempt any person who unlawfully practices or assumes to practice law; and a proceeding under this subdivision may be instituted on the court's own motion or on the motion of any officer charged with the duty of investigating or prosecuting unlawful practice of law, or by any bar association incorporated under the laws of this state."

Section 2-b, Judiciary Law:

"2-b. General powers of courts of record

A court of record has power

1. to issue a subpoena requiring the attendance of a person found in the state to testify in a cause pend-

ing in that court, subject, however, to the limitations prescribed by law with respect to the portion of the state in which the process of the local court of record may be served;

2. to administer an oath to a witness in the exercise of the powers and duties of the court and;

3. to devise and make new process and forms of proceedings, necessary to carry into effect the powers and jurisdiction possessed by it."

Section 216, Judiciary Law:

"216. Additional powers and duties of the appellate divisions

In addition to the powers and duties eleswhere enumerated in this chapter, each appellate division, with respect to the courts in its department, shall have power to:

1. Adopt, promulgate, supplement, rescind and modify rules and orders necessary to supplement its powers and duties hereunder including the supervision of the administration and operation of the courts in its department, not inconsistent with any statute hereafter adopted and the standards, policies, rules and orders of the administrative board.

Rule XII-A, Part 4:

"Rule XII-A. Preliminary Investigation of Persons, Firms or Corporations Unlawfully Practicing or Assuming to Practice Law.

Upon application by the Chairman or Acting Chairman of the Committee on Unlawful Practice of the Law of the New York County Lawyers' Association, the Association of the Bar of the City of New York, or the Bronx County Bar Association, disclosing that such Committee has reason to be-

lieve that a person, firm or corporation is unlawfully practicing or assuming to practice law, and that such Committee desires that an investigation thereof be conducted, or upon application by any such person, firm or corporation under such investigation, the clerk of this court shall issue subpoenas in the name of the Presiding Justice for the attendance of witnesses and production of books and papers before such Committee, or any subcommittee of such Committee designated in such application at the time and place within the First Judicial Department that said Committee or subcommittee regularly meets."

CPLR § 2302. Authority to issue

"(a) Without court order. Subpoenas may be issued without a court order by the clerk of the court, a judge where there is no clerk, an attorney of record for a party to an action, an administrative proceeding or an arbitration, an arbitrator, a referee, or any member of a board, commission or committee authorized by law to hear, try or determine a matter or to do any other act, in an official capacity, in relation to which proof may be taken or the attendance of a person as a witness may be required."

I

The Appellate Divisions of the Supreme Court of the State of New York have power, control and jurisdiction over non-lawyers who practice or assume to practice law.

The petition herein and the arguments advanced for its allowance are based upon the erroneous assertion that the abatement of an unlawful practice of law, in the State of New York, is exclusively a criminal prosecution and a

crime, punishable as a misdemeanor. On the contrary, an action to abate an unauthorized practice of law is regarded primarily as a civil proceeding, commonly resulting in an injunction restraining the unlawful practice.

See:

In re: *Roel,* 3 N.Y. 2nd 224 (1967), appeal dismissed 255 U.S. 604 (1958);
New York County Lawyers Assn. v. *Bercu,* 273 App. Div. 524 affirmed 299 N.Y. 728 (1948).

The New York practice and policy regarding the prosecution of unlawful practice matters was succinctly stated by the Appellate Division First Department in the *Bercu* case, *supra,* as follows:

> "To practice law *in any manner,* unless one be duly and regularly licensed and admitted to practice law, is a violation of Section 270 of the Penal Law and it has been determined that giving legal advice outside of Court is a violation of that statute. (Citing case) Three procedural routes are available for enforcing the statute. One is by criminal prosecution, another is by action for an injunction under Article 75A of the Civil Practice Act, and a third is by summary proceeding under Sections 90, subd. 2, and 750, subd. 7 of the Judiciary Law." (273 App. Div. at p. 527).

Criminal prosecutions are, in fact, the rarity rather than the rule.

Article 4, § 90 subd. 2 of the Judiciary Law, since 1937, has conferred upon the supreme court "power and control of . . . all persons practicing or assuming to practice law."

Petitioner's primary attack is on the authority of the Appellate Division, First Department, to order, conduct,

or sanction an investigation of non-lawyers assuming to practice law. What he seeks in effect, is immunity.

See: *Oklahoma Press Publishing Co.* v. *Walling,* 327 U.S. 186, 196.

The courts of New York have historically and traditionally exercised jurisdiction over, and have conducted investigations of, laymen whose activties impinge upon the practice of law, and when necessary, have issued subpoenas to compel the production of books and records.

> *Anonymous Nos. 6 and 7* v. *Baker,* 360 U.S. 287 (1959);
> *Matter of the Association of the Bar of the City of New York,* 222 App. Div. 580 (1st Dept. 1928);
> *Matter of S. Anonymous* v. *Arkwright,* 5 App. Div. 2nd 792 (2nd Dept. 1938).

In *Anonymous Nos. 6 and 7 v. Baker,* 360 U.S. 287 (1959), the appellants were private detectives and investigators summoned to testify before a justice of the Supreme Court appointed by the Appellate Division, Second Department to conduct a non-adversary, non prosecutorial fact-finding inquiry into alleged unethical practices of attorneys and others acting in concert with them. They refused to testify and were held in contempt. In affirming the contempt convistions this Court observed:

> "When the Appellate Division is apprised of conditions calling for general inquiry it usually appoints, as here, a Justice of the Supreme Court, sitting at Special Term, to make a preliminary investigation. The duties of such a justice are purely investigatory

> and advisory, culminating in one or more reports to the Appellate Division upon which future action may then be based. In the words of Mr. Justice Cardozo, then Chief Judge of the New York Court of Appeals, the proceedings at Special Term thus simply constitute a 'preliminary inquisition, without adversary parties, neither ending in any decree nor establishing any right . . . a quasi-administrative remedy whereby the court is given information that may move it to other acts thereafter . . .' *People ex rel. Karlin* v. *Culkin,* 248 N.Y. 465, 479, (360 U.S. 287, at p. 291).

Essentially the same procedure was followed and the identical result was reached in *Matter of the Association of the Bar of the City of New York,* 222 App. Div. 580 (1st Dept. 1928), and *Matter of S. Anonymous* v. *Arkwright,* 5 App. Div. 2nd 792 (2nd Dept. 1958), both involving laymen.

In *Matter of the Association of the Bar of the City of New York, et al., supra,* the respondent herein and two other bar associations petitioned the Appellate Division to investigate a practice commonly known as "ambulance chasing". The court ordered a Justice of the Supreme Court to investigate "with full power to summon witnesses and to compel the giving of testimony, as well as the production of books, papers and other documentary evidence", and further ordered that the investigation extend not only to "ambulance chasing" and the conduct of attorneys, but also to the conduct of *such laymen* as might be acting in concert with the attorneys or as intermediaries for them.

Thereafter, in *Matter of S. Anonymous* v. *Arkwright, supra,* the Appellate Division of the Second Department had occasion to consider a subpoena *duces tecum* which had been issued to a physician in connection with an investiga-

tion into the practices of certain attorneys and "others acting in concert with them". He attended, was sworn, and refused to answer questions, asserting that the order of the Appellate Division was invalid in that he was not an attorney and, accordingly not subject to the court's jurisdiction. He also asserted his privileges under the New York State and United States Constiution and his right to be represented by counsel during the inquiry. The Appellate Division, Second Department held:

> "It was within the power and jurisdiction of this court to make the order directing the inquiry and investigation (N.Y. Const., art. VI § 2; Judiciary Law, § § 86, 90; Matter of Bar Assn. of City of N. Y. 222 App. Div. 580; Matter of Brooklyn Bar Assn., 223 App. Div. 149; People ex rel. *Karlin* v. *Culkin*, 248 N.Y. 465), and petitioner was required to answer questions as to his actions in concert with an attorney subject to his right to refuse to answer such questions if his answer would expose him to punishment for crime or if his refusals were based on other valid grounds. In its discretion the additional Special Term might have permited petitioner's attorney to be present while petitioner was being questiond, since it is clear that he was merely a witness as to improper conduct of others but was himself to be questioned as to his own allegedly improper and unlawful acts in concert with an attorney, the petitioner in Matter of M. Anonymous. (5 A D 2d 790)." (5 App. Div., 2d at pp. 792-793)

Any possibility of doubt that the legislature intended the power and authority of the Appellate Division, under § 90, subd. 2 of the judiciary law (Appl. C p. 58), to extend to laymen was removed by the 1937 amendments to that section and § 750B of the Judiciary Law, (App. C. p. 68) which

added the phrase "all persons practicing or assuming to practice law" to the former and made such conduct punishable as a contempt of court by the latter.

In the instant case, the appellant, Charles A. A'Hearn, is, by his own admission engaged in a practice which falls within the classification of one who is "assuming to practice law." He states that he is, and for 25 years has been, "engaged in the business of pension and profit-sharing planning". (A 9), and he advertises and holds himself out to the public as available to perform services and accept employment in this field. (A 23)

Pension and profit sharing planning, by definition, includes the practice of law. A pension or a profit sharing plan is a legal document. In conjunction with such plans, there are necessarily involved the preparation of trust agreements, corporate minutes and resolutions, consideration and advice regarding applicable provisions of statutory law, particularly the Internal Revenue Code, appearances and arguments before the Internal Revenue Service and changes and amendments to the various agreements and documents relative to the adoption, promulgation and implementation of such plans. (A 20, A 27-28)

The business which the petitioner engages in materially, directly, and inevitably, affects the practice of law, and by engaging therein, the petitioner has brought himself under the jurisdiction of the Appellate Division, First Department.

II

Respondent's committee is a quasi-judicial body acting as an arm of the Appellate Division under Rule XII-A; the investigation of an unlawful practice of the law is a judicial proceeding.

It has been shown that the power to issue subpoenas in aid of investigations into the practices of laymen which affect the practice of the law is within the powers and authority of the Appellate Divisions of the Supreme Court in the several departments of the State of New York.

In addition thereto, it is clear that the Appellate Divisions may enlist the aid of attorneys, associations of attorneys and committees of such associations in investigating conduct which impairs, impedes, or infringes upon the practice of the law.

> *Weiner* v. *Weintraub,* 22 N.Y. 2d 331 (1968);
> *Dacey* v. *New York County Lawyers Association,* 290 F. Supp. 835 (S.D.N.Y. 1968);
> § 90 Judiciary Law.

The analogy between the investigation of those who have been licensed and those who, although not licensed, nevertheless assume to practice law is inescapable.

The Court of Appeals of the State of New York has recently held that a proceeding before the Grievance Committee of a bar association investigating professional misconduct is a "judicial proceeding" and the committee conducting the proceeding "acts as a quasi-judicial body and, as such, is an arm of the Appellate Division."

Weiner v. *Weintraub, supra.*

An unlawful practice committee of such a bar associaiton investigating the conduct of a person who unlawfully assumes to practice law is equally a quasi-judicial body conducting a judicial proceeding and, as such, is acting as an arm of the Appellate Division.

The United States District Court for the Southern District of New York recently considered the position occupied by the respondent in the institution of proceedings in connection with the unauthorized practice of the law in *Dacey* v. *New York County Lawyers Association, supra.*

In the *Dacey* case, an action was brought against respondent under § 1983 of Title 42, U.S.C., to recover damages and for an injunction following the dismissal of proceeding brought by respondent against *Dacey.* Granting a motion by respondent to dismiss Dacey's complaint, the court (Wyatt, D.J.), relying, in part, upon the holdings in the State Courts in the instant case, stated:

> "It thus appears that the Association when it acts under Judicial Law § 750 B is a part of the judicial proeess of New York. The situation at bar seems exactly the same as that of a bar association sued for damages for its activities under Court Rule which led to the disbarment of a lawyer. This happened in the State of Washington. The lawyer then sued the bar association under the civil rights laws, 42 U.S.C. § 1983. The association was held to have absolutely immunity (*Clark* v. *State of Washington,* 366 F. 2d 678 (9th Cir. 1966)), the Court saying (at 681):
>
> > 'As an arm of the Washington Supreme Court in connection with disciplinary proceedings, the Bar Association is an "integral part of the judicial process" and is therefore entiled to the same im-

munity which is afforded to prosecuting attorneys in that state.'

I am unable to distinguish the situation in *Clark* from that at bar.'' (290 F. Supp. at p. 841-2)

It is respectfully submitted that the situation herein is truly indistinguishable from that which pertained in *Clark* v. *State of Washington*, 386 F. 2d, 678 (9th Cir. (1966)); *Wiener* v. *Weintraub*, 22 N.Y. 2d 331 (1968); and *Dacey* v. *New York County Lawyers' Assn.*

The Appellate Division of the First Department has the power to order and sanction the investigation of persons assuming to practice law within its department, to enlist the aid of bar associations in furtherance thereof and adopt Rule XII-A in aid therof. Such an investigation constitutes a judicial proceeding and respondent's committee is, in conducting the same, a quasi-judicial body acting as an arm of the court.

III

No constitutional rights, privileges or immunities of the appellant have been infringed.

Probable cause need not be shown as a prerequisite for the issuance of a *subpoena duces tecum.*

U.S. v. *Powell*, 279 U.S. 48 (1964);
Ryan v. *U.S.*, 379 U.S. 61 (1964).

The subpoena herein (A 13), on its face, complies with every requirement which has been invoked by the courts.

The subject matter of the inquiry is set forth on the face of the subpoena, the records and documents are specifically

described and the scope of the subpoena is limited to transactions occurring within a period of 17 months (A 13). The relevancy of the documents directed to be produced is patent. Each and every one of them relates specifically and directly to the services performed by the appellant in connection with the operation of the business of pension and profit-sharnig planning in which appellant was concededly engaged. (A 9, A 13).

The distinction between what is required in connection with the issuance of the subpoena and what is required in connection with the issuance of a search warrant has been enunciated time and time again.

As the courts below properly held, a subpoena need only be supported by a showing that the material sought is reasonably related to the matter being investigated, the public purpose sought to be achieved, and that the investigation is authorized by law.

Matter of LaBelle Creole Int. S.A. v. *Attorney-General of State of N.Y.*, 10 N.Y. 2d 192
Matter of Ryan v. *Lefkowitz*, 26 A.D. 2d 604, affd. 18 N.Y. 2d 977 (1966);
Matter of Dawn Operators v. *Lyon*, 283 App. Div. 358, mot. for lv. to app. den. 360 N.Y. 977, app. dsmd. 307 N.Y. 673 (1954);
Matter of Prestige Sewing Stores of Queens v. *Lefkowitz*, 54 Misc. 2d 188;
Oklahoma Press Pub. Co. v. *Walling*, 327 U.S. 186 (1945);
See also *United States* v. *Powell*, 279 U.S. 48 (1964);
United States v. *Morton Salt Co.*, 338 U.S. 632 (1949);
Ryan v. *United States*, 379 U.S. 61 (1964).

No one has entered petitioner's premises, nothing has been seized, no one has been searched.

No testimony or records which the petitioner believes might be used in evidence against him can be compelled to be given or produced since, obviously, all he need do is assert his privilege under the Fifth Amendment to the United States Constitution, or Article 1, Section 6 of the Constitution of the State of New York.

No penalty or forfeiture will be visited upon petitioner should he appear and refuse to answer any question or produce any record upon the ground that it might incriminate him.

Should petitioner so appear, and plead the Fifth Amendment as a bar to his testimony or the production of his records, respondent will then have to determine whether it should seek to have immunity from criminal prosecution conferred upon the petitioner so that his answers and records may thereupon and thereafter be elicited. Certainly, it requires no argument to establish that the bar of the Fifth Amendment does not preclude the obtaining of evidence for use in connection with the enforcement of the civil remedy of injunction. Obviously this is precisely what petitioner seeks to avoid.

It is difficult, if not impossible to follow the arguments advanced by petitioner with respect to the application of the Sixth and Fourteenth Amendments to the instant situation. As appellant has asserted repeatedly, no civil or criminal prosecution has been instituted against him (A 10).

In this situation, it is rather difficult to understand how the appellant can have already been deprived of the oppor-

tunity to be confronted with the witnesses against him, to have a public trial or how it is possible for him to ascertain that upon such a trial he will be prosecuted in an unfair and prejudicial manner, deprived of life, liberty or property without due process, and will not receive the equal protection of the law.

CONCLUSION

Under the provisions of § 90, subd. 2, of the Judiciary Law, non-lawyers assuming to practice law are within the power and control of the appellate divisions of the Supreme Court of the State of New York which have the authority to conduct and sanction investigations into such conduct. Rule XII-A of the Special Rules of the Appellate Division, First Department was properly adopted by it in aid of such investigations, and a committee of a bar association acting thereunder is a quasi-judicial body acting as an arm of the court in a judicial proceeding. The subpœna *duces tecum* issued by the Clerk of the Appellate Division, First Department herein is a valid exercise of the court's power, reasonable in scope and is directed to testimony, books, records, documents which are material and relevant to the inquiry.

None of petitioner's right, privileges or immunities under the Fourth, Fifth, Sixth or Fourteenth Amendments to the Constitution of the United States have been violated.

The petition for certiorari should be denied.

Respectfully submitted,

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